UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HAROLD BROWN	)	
	)	DOCKET NUMBER
v.	)	NY075281F1457
	)	
FEDERAL AVIATION ADMINISTRATION	)	
	)	

ERRATA

In reference to the above-identified case, corrected pages 2, 10, 12, 14, 19, 25 are forwarded for replacement of the original pages of the Dissenting Opinion of Board Member Dennis M. Devaney dated May 19, 1983. The attached pages correct typographical errors contained within the original pages.

FOR THE BOARD:

May 23, 1983
Date

Robert E. Taylor
Secretary

strike, he stated that "the strike was illegal," but that "he supported some of the striker's demands." H.T. at 87.2/

By letter dated August 5, 1983, the agency proposed appellant's removal based on two separate charges, participation in an illegal strike and misconduct. See Opinion and Order at 1-2 for the text of this letter. The agency did not sustain the strike participation charge.3/ Both charges relate solely to the content of the appellant's statement that was broadcast on the ABC News "Nightline" program. This single sentence statement forms the basis for discharge.4/

In Pickering v. Board of Education, 391 U.S. 563 (1968), the Supreme Court held that a public employee does not relinquish First Amendment rights to comment on matters of public inter

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2/ The videotape of this interview was shown at the hearing but was not entered into the record before the Board. Thus, appellant's testimony on this issue remains uncontroverted. The agency's notice of proposed removal makes no reference to this subsequent statement. Contrary to the sub-silentio analysis of the majority, I believe that the uncontroverted testimony in the hearing transcript with respect to this second interview provides an important perspective on the events at the union hall.

3/ As set forth in Schapansky v. FAA, illegal strike participation requires a finding of withholding of services from the government employer in concert with others. No such finding would be possible on this record. Thus, illegal strike participation under 5 U.S.C. § 7311 is of a much different character than public discussion of an ongoing federal work stoppage, such as the 1981 PATCO strike. See United Federation of Postal Workers v. Blount 325 F. Supp. 879, 883 (D.D.C. 1971), aff'd 404 U.S. 802, and National Association of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969). (Court invalidated on First Amendment grounds a section of 5 U.S.C. § 7311 which made advocacy of a strike by public employees illegal.)

4/ The majority seems to suggest that appellant is somehow culpable for the manner in which his statements at the union hall aired on Nightline. The editorial comments supplied by the newscaster can in no way be attributed to appellant. In point of fact, appellant's additional statements, which are not part of the program which aired, convincingly defeat any inference that he supported the illegal strike. See note 3, supra.

by virtue of government employment. Connick v. Myers, No. 81-1251, slip Op., at 1, (April 20, 1983). Justice White, writing for the Myers majority, further amplified the Pickering holding as follows:

> We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." Id., at 568. The problem, we thought, was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Myers, supra, at 1.

Today, a majority of the Board effectively strips federal employees of the free speech protections accorded by the First Amendment. In the wake of the majority's Order, the careful balancing test developed in Pickering and applied in its progeny[5/] is left in shambles. The majority affirms termination of appellant from federal employment after 25 years of exemplary service based on a single-sentence expression of his personal opinion made while off duty.[6/] This action is affirmed despite the undisputed evidence that appellant was never notified that the agency would consider such a statement as

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5/ See e.g., Perry v. Sindermann, 408 U.S. 593, 597 (1972) and Branti v. Finkel, 445 U.S. 507, 515-516 (1980).

6/ As recognized in Myers, since the speech at issue transpired entirely off duty, "different factors enter into the Pickering calculus." Id. at 14, note 13.

grounds for removal. The chilling effect of this decision will be felt across the federal service.7/

ANALYSIS

First Amendment Issue

Although the agency labeled the charge against appellant as "Misconduct," the specification relates solely to appellant's statement as aired on "Nightline." Thus, were appellant's speech protected under the First Amendment, as I believe it is, the removal action could not be sustained. I disagree with the majority conclusion that appellant's speech was not within the

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7/ Sadly the majority apparently fails to grasp the serious mischief inherent in its decision. The Pickering standard was rooted in a concern that government employees First Amendment right to discuss matters of public concern not be prevented or "chilled" by fear of discharge, merely because certain public officials were annoyed or embarrassed by their comments. Myers, supra, at 6. Today the Board abolishes by fiat the requirement that some adverse impact upon the efficiency of the service be demonstrated. Apparently the Board reserves unto itself the right to determine based upon as yet unspecified criteria what issues or events are matters of significant public concern. Opinion and Order, at 8. But see, Thornhill v. Alabama, 310 U.S. 88, at 102 (1940). In Thornhill, the Court held:

> Freedom of discussion, if it would fill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. (Citations omitted.)

Id. at 102.

purview of the First Amendment guarantees. I also disagree with the conclusions of the majority regarding nexus to the efficiency of the service and mitigation under the Board's own precedents. In light of the Constitutional dimensions of the freedom of speech issue, I will address that first. However, since the agency's interest in promoting the efficiency of the service is an integral component of the Pickering balancing that much of that discussion is equally applicable to the nexus determination.

In applying the balancing test that the Pickering Court articulated, the nature of the speech, the impact of the speech on the employment relationship, and the efficiency of the public service must be considered. Among the factors considered relevant to the nature of the speech are whether the speech was knowingly or intentionally false, and whether the speech related to an important matter of public concern. Id. at 571-2. In considering the impact on the employment relationship and the efficiency of the public service, the Court in Pickering looked to: (1) whether the speech interfered with the maintenance of "either discipline by immediate superiors or harmony among co-workers." id. at 570; (2) whether the speech was critical of supervisors with whom the speaker maintained "the kinds of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning", id.; (3) whether the speech impeded the employee's proper performance of his daily duties, id. at 572; and (4) whether the speech interfered with the regular operation of the office generally, id. at 573.

The critical significance of questions concerning strikes by public employees has been specifically and repeatedly recognized by the courts in their review of the constitutionality of statutes and Executive Orders prohibiting such strike activities by public employees. In National Association of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969), (hereinafter "NALC v. Blount") the court invalidated those portions of 5 U.S.C. § 7311 which proscribed the assertion of the right to strike by federal employees. In finding a justiciable controversy to exist in the case the court stated:

> [R]ecent cases indicate that where freedoms of expression and association are involved, the threat alone of loss of job, criminal sanction or other penalty may inhibit, or "chill" their exercise and thus require court intervention to preserve them . . . . The statute and oath combined may . . . inhibit a variety of other activities, on and off duty, protected by the first amendment, including legislative effort on behalf of the right to strike, group discussion, and legitimate protest short of an actual strike . . . (emphasis added).

305 F. Supp. at 549.

Similarly, in upholding the constitutionality of the no-strike provisions themselves, a different three-judge panel of the same court recognized that "it should be pointed out that the fact public employees may not strike does not interfere with their rights which are fundamental and constitutionally protected." United Federation of Postal Clerks v. Blount, 325 F. Supp. 879, 883 (D.D.C. 1971), aff'd 404 U.S. 802. Quoting International Union, U.A.W.A., A.F. of L. Local 232 v. Wisconsin Employment Relations Board, 336 U.S. 245 (1948),

the Court noted the contrast between "the right to strike, because of its more serious impact upon the public interest" and "the right to organize and select representatives for lawful purposes of collective bargaining which this court has characterized as a 'fundamental right.'"

In my view, the repeated involvement of the federal courts in questions similar to the one addressed by the remarks of appellant herein, and the courts' continued recognition of the standing of individuals and organizations to raise such issues even absent real or threatened prosecution by the government, is sufficient alone to demonstrate the public character and importance of these controversies. Additionally, however, there is direct evidence of the unusually strong media and public reaction to the August 1981 PATCO strike. Appellant's remarks themselves were telecast on a national news program. That program and other news reports during August 1981 invariably led with stories concerning the strike, its national significance and impact, and the merits of the positions of the adversaries in the matter. The President, Secretary of Transportation, and various labor leaders, among others, were interviewed and/or made statements concerning their positions.

Having agreed that the underlying subject matter of appellant's remarks was "clearly a matter of public concern at that time," the majority nonetheless concludes that his speech "is only entitled to limited First Amendment protection because its relation to matters of public concern was merely tangential." I cannot agree.

To the extent that conclusion is premised on the forum in which the remarks were made and that they were made to fellow

employees, I find such factors unpersuasive to the question of their public character and public importance. Appellant stated to a television newsman that although the strike was "illegal," he supported some of the strike demands. The allegedly offensive statements were made to a large group and the presence of the media must have been known to appellant at the time. There is no evidence that his qualified support was not premised on his views concerning air traffic safety and how the working conditions at issue in the negotiations related thereto.8/

Nor do I find persuasive the majority's implicit finding that the existence of a national emergency somehow served to dilute the First Amendment protections to be afforded appellant's remarks. As stressed elsewhere in this opinion, I find no evidence that taken as a whole the speech served to reduce appellant's effectiveness, judgment, or diligence as an employee. Furthermore, it is matters involving emergencies, or at least significant controversies, which frequently impact on the social fabric and result in the need for the unfettered public debate that the First Amendment seeks to foster. To suggest that the existence of a public crisis should be viewed as the operative instrument in creating a diminished constitutional standard, is to retreat from the principle that a democracy draws its strength from its ability to entertain public comment and criticism.

8/ Not being a member of the bargaining unit, appellant did not stand to directly financially benefit from the outcome of the impasse. Compare Myers, supra, at 15.

The federal courts of appeal have unanimously interpreted the Pickering balancing test to mean that absent "material and substantial interference" with the operations of the public department, public employees' speech cannot be regulated. See, e.g., Monsanto v. Quinn, 674 F.2d 990, 995 (3rd Cir. 1982) and cases cited therein; and Kim v. Coppin State College, 662 F.2d 1055, 1065 (4th Cir. 1981).

In general, courts have interpreted Pickering to require that there be actual evidence of this material and substantial interference. That is, there must be some showing of actual adverse impact or actual harm. Monsanto, supra; Kim, supra, at 1065; Williams v. Board of Regents of University System of Georgia, 629 F.2d 993, 1002-1004 (5th Cir. 1980), cert. denied, 452 U.S. 926 (1981); Van Ooteghen v. Gray, 628 F.2d 488 (5th Cir. 1980), cert. denied, 455 U.S. 909 (1982); Tygrett v. Barry 627 F.2d 1279, 1285-87 (D.C. Cir. 1980). In Kim, the court refused to uphold the denial of a pay increase to two faculty members who had participated in a student boycott. (One joined the picket line and the other allegedly offered counsel.) The Court said, "[A]n objective evaluation of the actual harm caused, not perceived or potential harm, is required." Kim at 1065. In Tygrett the Court said, ". . . Pickering required the trial court to have more carefully addressed what actually was, not what, 'by reasonable inference' might have been." Id. at 1285. Note also Porter v. Califano, 592 F.2d 770, 778 (5th Cir. 1979) where the court warned against the acceptance of the government's "vague"

and "biased" evidence when witnesses were available and could have been called to testify concerning the alleged harm which the Court refused to infer.

The Tygrett Court observed:

> When confronted with firings, that implicate a public employee's First Amendment rights, the courts are required to conduct an individualized and searching review of the factors asserted by the employer to justify the discharge. The purpose of such a review is to assure that those factors have been applied with the deference to be accorded First Amendment rights. (Citations ommitted.)

Id. at 1283.

The Tygrett Court, then refused to sustain the removal of a probationary police officer for advocating participation in a "sick-out" or "blue flu" as an effective means of pressing union demands. The court squarely rejected the argument that the discharge could be sustained based on a "reasonable inference" that advocacy of participation in "blue flu" undermined his effectiveness as a police officer.

Contrary to this well-reasoned approach, the majority concludes that no showing of actual "material and substantial harm" is necessary. The agency has consistently argued that appellant's statement had an adverse impact on their ability to control the strike. The evidence contained in the record, taken as a whole does not support this position.

The record indicates that the deciding official determined that the removal of appellant was warranted for the following reasons:

> ... I think that because of his appearance at that union hall and of course being broadcast nationwide, encouraged controllers that were wavering--or who had not made a decision yet, that could have gone back to work--he encouraged those people to stay out on strike, because he indicated that perhaps management was now supportive. And, maybe the New York TRACON or all of the team supervisors were now supportive of the strike.
>
> In addition, it was contrary to the instructions that the President had given out, and the administrator and myself--encouraging people to participate in a strike, which of course is illegal.

H.T. at 23-24.

He also opined that appellant "... did not function as a Manager any longer." Id. at 24. Thus, the deciding official's major concerns were that appellant's remarks had been disruptive in that strikers who might have returned to work were influenced not to do so, that appellant had impliedly criticized his superiors by contradicting the instructions to return to work, and that appellant therefore could not function as a manager in the future.

Review of the record reveals that the deciding official's testimony is the only testimony relevant to the potential effect of appellant's speech on the work place. The deciding official's assertion regarding the encouragement of controllers to continue striking rather than reporting to work is not supported by any evidence of the effect, if any, on any individual air controller. Appellant's speech was an exhortation that the striking controllers "stay together" and a prediction that they "would win". The agency presented no witnesses and adduced no evidence showing that any controllers actually believed appellant or refused to report for duty because of appellant's remarks.

On August 4, 1983, the strike had already idled 97 percent of the controllers at the New York facility. The maximum effect of the strike had already been felt. Indeed, appellant himself was working twelve-hour shifts at TRACON directing traffic to compensate for the absence of the controllers. Such conduct cannot be interpreted as supportive of the strike. Appellant's uncontroverted testimony is that he went to the union hall to assure the controllers that he was working. H.T. at 87. The majority misinterprets and misapplies the rationale of the majority opinion in Myers, supra, at 8-9, to dispel any need for a showing of actual harm based on appellant's speech.

Thus, while appellant's speech may have shown that he supported the goals of the strike, and even of some of the demands of the strikers, there is no evidence that his speech furthered the strike.

Assuming arguendo, that appellant's speech contradicted the agency's instructions and was therefore critical of his superiors, without a showing of some actual impact on the agency's operations, such fact would not by itself render the speech unprotected under the Pickering balancing test. As was the case in Tygrett, supra, the record lacks evidence of harm. In Tygrett, the court upheld a police officer's right to advocate resort to a "sick out" or "blue flu", despite the fact that police strikes were illegal. See NALC v. Blount, supra. The court made it clear that the First Amendment could not be "laid aside" for a state of mind manifested in speech, and noted that, pursuant to Pickering, some interference with the efficiency of the public service must be shown. Id. at 1285.

Turning to the question of loss of confidence in appellant as a manager, again the only evidence of record is the deciding official's statement that he believed that the appellant could no longer function as a manager. While I do not question the deciding official's personal opinion in this regard, I must note that there were numerous levels of management between appellant and the deciding official. The record does not contain sufficient evidence to sustain a finding that such loss of confidence was shared by others such that an adverse effect on appellant's ability to continue as a manager has been demonstrated. Perhaps most telling is the lack of any evidence or even allegation, that the nonstriking controllers with whom appellant worked most closely, had lost confidence in his ability. Appellant's relationship to those individuals was far more critical based on the nature of his job. The agency neither asserted nor established that appellant's working relationship with the deciding official was of the sort that "personal loyalty and confidence are necessary to their proper functioning". (Emphasis added.) Pickering, at 570. Thus, the record does not provide any basis on which to conclude that appellant's remarks had any actual effect or even any substantial likelihood of potential effect on his ability to perform the duties of his position or the ability of other agency employees to perform in their positions.

Therefore, I believe that there is insufficient evidence of disruption of important working relationships, or adverse impact on either appellant's performance or general agency operations to establish actual or potential material and

substantial interference with the mission of the agency.9/ See Farris v. U.S. Postal Service, MSPB Docket No. AT0752811012 (February 22, 1983.)

9/ Indeed, the agency's decision to terminate appellant based on this single charge cannot be easily reconciled with their desperate need for his services during the strike period. The cases striking the balance in favor of the agency generally do so because an employee was speaking on a matter related to his personal gain and of no public importance and because his speech was shown to have compromised the mission or program of the public department through intolerable disruption. See, e.g., Myers, supra, employee's discharge due to circulation of a questionaire dealing with the effect of office personnel policies on morale and overall work performance of the office held unprotected because of limited first amendment interest and demonstrated potential effect on the work place; Garcia v. United States, 666 F.2d 960 (5th Cir. 1982); informant was terminated from federal witness protection program for having publicized who and where he was; Anderson v. Evans, 660 F.2d 153 (6th Cir. 1981), one of few white teachers in almost all black school made racial slurs and remarks disparaging blacks to principal and other black officials at the school; Martin v. Dahl, 658 F.2d 731 (10th Cir. 1981), refusal to renew scholarship of members of women's basketball team who had criticized their head coach to the department held proper as there were no issues of public concern and there was general disruption in the basketball program; Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981) official's action in bringing an internal matter to the notice of an officer of an organization with whom his agency conducted a great deal of business was not protected where such action was a direct attack on his supervisor and made it impossible for the official to perform effectively at the agency; Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), suspension of police lieutenant who made disparaging and disrespectful remarks about his supervisor at a morning inspection was upheld because of close personal contact with the supervisor, the fact that he said nothing vital to informed decision making, and that his comments were not made as a member of the general public but as an officer of the department; and Smith v. United States, 502 F.2d 512 (5th Cir. 1974), action of a clinical psychologist at a VA hospital who provided treatment to emotionally disturbed patients while wearing a peace pin on his lapel held unprotected because of expert testimony regarding its harmful effect on patient treatment. See also Brousseau v. United States, 640 F.2d 1235 (Ct. Cl. 1981); Brousseau, a GS-15 supervisor in a regional office of the Community Services Administration, made a motion in a union meeting protesting a proposed reorganization plan which had been approved by his supervisor. In addition, he circulated a petition protesting the reorganization among the regional staff and forwarded it to regional headquarters. This speech was held unprotected largely on the basis of the record evidence of disruption to close working relationships, and the unwillingness on the part Brousseau to implement his superior's directions at the work place; Curry v. Department of the Navy, MSPB Docket Number SF07528110627 (September 21, 1982); Quarry v. General Accounting Office, 3 MSPB 299

In Myers, the Supreme Court once again reaffirmed the Pickering balancing test. The majority opinion considered at length the intricacies of its application in the public sector as articulated in precedents since Pickering.

In Myers, the majority held, consistent with Pickering, that public employee speech which involves matters of little or no public concern and which is made for personal gain and involves bureaucratic tangle at the work place, may be more severely regulated than speech which more clearly relates to matters of public concern. The Court observed that whether an employee's speech addresses a matter of public concern must be determined by the "content, form and context of a given statement, as revealed by the whole record." (Emphasis added.) Myers, supra at 9. Considerations of "manner, time and place" are also relevant to the inquiry of how the Pickering balance should be struck. The Court noted: ". . . [e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office, brings different factors into the Pickering calculus, and might lead to a different conclusion." Id. at 14, n.13.

The Myers Court stated that in certain limited instances where the public concern is not great, an employer need not wait until actual "disruption of the office" becomes manifest before taking action, but rather may rely on evidence of potential harm. Myers at 13. However, the Court also stated, ". . . a stronger showing [of actual harm] may be necessary if the employee's speech more substantially involved matters of public concern." Id. Cf. Curry v. Navy, SF07528110627 (September 21, 1982) (Board held supervisor's sexist comments to female

apprentice to the effect she should look for a "typewriter job" were not a matter of public concern and thus entitled to limited First Amendment protection).

The Court emphasized that its holding that the speech involved in Myers was unprotected was based on the specific fact situation presented in that case. The Court held that only one of the fifteen questions contained in the internally circulated questionnaire dealing with office morale and working relationships arguably related to a matter of public concern, and the questionnaire therefore was ". . . more accurately characterized as an employee grievance concerning internal office policy".

The Court stated that only a "limited First Amendment interest" was present and that the record as a whole thus required the balance to be struck in favor of the employer. Id. However, the Court cautioned, as it had in Pickering, that because of the enormous variety of possible fact situations it was neither appropriate nor feasible to set forth a general standard against which all statements may be judged. Explaining its action in Myers, the Court stated that "[o]ur holding today is grounded in our long-standing recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern . . . ." Myers, supra, at 15-16.

Balancing the appellant's constitutionally protected right of assertion and his interest in speaking out on a matter of public importance against the agency's concerns, I conclude that the evidence of record and relevant judicial precedent fully support the presiding official's holding that appellant's speech was protected by the First Amendment to the Constitution.

Apart from the issue of whether or not appellant's statements constituted protected speech, I believe that the agency's removal action cannot be sustained since it has not been shown to promote the efficiency of the service, as required under 5 U.S.C. § 7513(a). As correctly noted by the presiding official, a determination of this issue turns on "whether there was any connection between the employee's activities and the efficiency of the service." Young v. Hampton, 568 F.2d 1253, 1258 (7th Cir. 1977).

In the case of Merritt v. Department of Justice, 6 MSPB 493, 509-510 (1981), the Board adopted the criteria for such determinations established by the Young case, and others. The Board held that the burden is on the agency to support, by a preponderance of the evidence, its allegation of "nexus" between an employee's off-duty misconduct and the efficiency of the service. 5 U.S.C. § 7701(c)(1)(B).

I concur in the presiding official's determination that the same lack of evidence of any substantial or material interference with the agency's operations or appellant's performance[10/] is also sufficient to support a finding that the agency has failed to meet its burden of proving a nexus between that conduct and the agency's or appellant's ability to perform their duties.

More specifically, I find the agency's asserted basis for finding nexus in this case to be totally without merit. The agency contends in its petition for review that appellant's

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10/ This lack of evidence of harm caused by appellant's statements underlies my conclusion, above, that such speech was protected.

comments, as a team leader, were likely to influence striking controllers, inasmuch as his

> indication of support for the strike among managerial personnel could have been interpreted as raising the possibility of sympathetic action by managerial personnel. Appellant's specific comments, to the effect that if the strikers stayed together they would win, could have been interpreted as a suggestion from a manager within the system, potentially privy to confidential information concerning agency policy, that the agency was preparing to concede to the controllers' demands if the strike continued. Further, at that time, supervisors were filling controllers' jobs and operating the system. Appellant's comments could have been taken to indicate that the system was not functioning well under operation by supervisors, and if the controllers continued the strike, the system would break down. [Emphasis added.]

Contrary to the agency's argument, I find these interpretations to be the sort of "mere assertion or speculation" that the Board held to be insufficient and improper as support for a finding of nexus in cases of clearly criminal conduct, much less in a case, such as this, of public expression, whether it be protected or unprotected speech. See Merritt, supra, at 510. Further, the agency's references to a television news commentator's observation that appellant's speech was "the highlight of the meeting" are unpersuasive. Such an impromptu media evaluation of the effect of the appellant's speech on his audience's spirits is hardly reliable proof of its deleterious effect on the efficiency of the service.

As discussed above, the agency has neither asserted nor established that appellant's working relationship with the deciding official required "personal loyalty and confidence" to properly function. On the contrary, as a first-line team leader of "rank-and-file" air traffic controllers, appellant's

relationship with his immediate nonstriking subordinates would seem to be equally significant in this respect, yet there is no testimony or affidavit from them regarding any adverse effect on his capability as a supervisor as a result of his alleged misconduct. Indeed, it is as reasonable to assume that their loyalty to and confidence in appellant as their supervisor were enhanced by his expression of personal support for some of PATCO's demands for their improved welfare, as it is to accept unquestioningly the deciding official's remote and personal estimation that apellant could no longer function as their manager following the events of August 4, 1981.

Thus, the record does not provide any basis on which to conclude that appellant's remarks had any actual effect or even any substantial likelihood of effect on his ability to perform the duties of his position or the ability of other agency employees to perform in their positions.

Ironically, the agency's need for appellant's services was especially crucial during the strike, as evidenced by the additional shifts he was required to work. Thus, it is at best paradoxical that the agency should instigate a removal action which, under the circumstances, not only fails to promote, but, in fact, impedes the efficiency of the service.

Assuming, arguendo, that appellant's comments on August 4, 1981, constituted actionable conduct, I believe that mitigation of the penalty was clearly warranted under the circumstances of this case. The scope of the Board's review

of the agency's selection of a penalty was discussed in Douglas v. Veterans Administration, 5 MSPB 313 (1981). After noting that a penalty should be selected only after the relevant factors have been weighed, the Board held that the purpose of its review is to ensure that the agency conscientiously considered the relevant factors and, in choosing the penalty, struck a responsible balance within the limits of reasonableness. The most relevant factors in this case are: the seriousness of appellant's offense; his status as a team leader; his past work and disciplinary record; his length of service; the effect of the offense upon his ability to perform at a satisfactory level and its effect upon his supervisors' confidence in his ability to perform his duties; the consistency of the penalty with those imposed upon other employees for the same or similar offenses; and the clarity with which he was on notice of any rules that might have been violated in committing the offense.11/ There is no indication, however, that the agency considered any factors other than whether the charges were true.

Whenever an agency's action is based on multiple charges, some of which are not sustained, the Board should carefully consider whether the sustained charges merited the penalty imposed. As noted above, the agency originally based its action on strike participation and misconduct. Although the agency deciding official did not sustain the charge of strike

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11/ These and other factors are set forth in Douglas, supra, at 332.

participation, I note that since appellant at no time withheld his services from his employer, this charge could not have been sustained under the Board's unanimous holding in Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (October 28, 1982). However, the agency did not consider any potentially mitigating factors even after withdrawing one of its two charges.

With regard to the factors relevant to this case, I note that, as discussed above, the gravity of appellant's alleged misconduct and its effect on his supervisors' perception of his ability to perform are matters of some evidentiary dispute, immediately casting into doubt the propriety of imposing the harshest penalty. Further, appellant has accumulated approximately 25 years of service with the agency, the last two as a team leader. He had previously been disciplined once for participating in an unlawful job action during a 1970 "sick-out" of air traffic controllers. As properly discussed by the presiding official, although appellant should reasonably have expected his comments of August 4, 1981, to be regarded unfavorably by the agency, there is clear evidence in the record that he had never been instructed not to speak to the strikers or the press and was insufficiently put on notice that his conduct would be so proscribed by the agency as to result in his immediate discharge without prior warning. Perhaps the most significant of the mitigating circumstances surrounding this case is the egregiously disparate treatment accorded appellant and those controllers who intentionally abdicated their

responsibilities by actively participating in the illegal PATCO strike. The latter were afforded a presidential amnesty period of approximately 48 hours in which to return to duty without sanction of any kind, while appellant, who worked additional shifts up to the moment of his removal during a period of critical manpower shortage, was summarily terminated without consideration of a lesser penalty. Such a result is anomalous at best and clearly exceeds the "tolerable limits of reasonableness" contemplated by the Board in Douglas, supra, at 333.12/

The majority's reliance on the cases of Brousseau v. United States, 640 F.2d 1245 (Ct. Cl. 1981) and McDowell v. Goldschmidt, 498 F. Supp. 598 (D. Conn. 1980), for the proposition that the sensitive nature of appellant's position as a supervisory air traffic controller necessitated a greater level of confidence in his ability to perform capably and function as a supervisor, is misplaced and does not lend support to its conclusion that removal is reasonable. In Brousseau, at 1244, the court held that a supervisory employee's misconduct, which it found to have jeopardized the integrity and efficiency

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12/ Appellant has also introduced evidence of another removal action in a case, similar to this one, entitled Wakefield v. Gunter, No. 81 C 5105 (N.D. Ill. 1982). In that case, the agency's Chicago facility withdrew removal actions against three non-PATCO agency employees. The conduct consisted of offering to join the strike and carrying a strike-related sign while walking in a picket line. The agency abandoned the removal action after it became aware that it was not illegal for the employees to assert the right to strike. I find this evidence of clearly disparate and preferential treatment of these employees to be further cause for mitigating the removal action imposed by the agency in this case.

of agency management, provided a "rational basis" for the agency's determination that his demotion to a nonsupervisory position would promote the efficiency of the service. In McDowell, the court's finding that the air traffic controller employee could not be trusted to perform capably, and had demonstrated a lack of judgment incompatible with his sensitive position, was based on a sustained charge of serious drug law violations and is thus wholly inapposite to this case in which the alleged misconduct is a single public utterance of questionable effect.

Indeed, the Board's decision to uphold the removal penalty in this case is inconsistent with its own prior holdings in similar cases involving charges against an appellant holding a supervisory position. Most significant in this regard is the Board's decision in Curry, supra, at n.9. In that case, the supervisory employee was found to have "engaged in a diatribe which was wholly subversive of management's policies with respect to promoting equal employment opportunity, and coercive and intimidating in its intent and effect." The appellant's remarks, which were the basis of the charges against him, were found to have little or no value as public comment or information, to be directly disruptive to the appellant's employment relationship with his subordinates, and to be subversive of good order, efficiency, and discipline. Nevertheless, in light of certain mitigating factors, fewer in number and lesser in cumulative effect than those present in this case, the Board found demotion to a nonsupervisory position to be the maximum reasonable penalty.

In Marchand v. Equal Employment Opportunity Commission, MSPB Docket No. SF07528110665 (July 26, 1982), the appellant's poor performance, failure to follow instructions, and documented inability to perform as a supervisor were considered "dangerous precedent[s]" which influenced the conduct and adversely affected the performance of his subordinates. However, in light of mitigating circumstances, the Board affirmed the presiding official's reduction of the agency's imposed removal penalty to one of demotion to the next lower-grade nonsupervisory position which he could be expected to perform in a fully satisfactory manner, free of managerial responsibilities, as the maximum reasonable penalty.

In Dobroski v. Department of Justice, MSPB Docket No. SF07528010278 (July 20, 1982), a supervisory employee occupying a position involving "highly sensitive duties requiring the highest degree of trust" was found to have engaged in "criminal, dishonest, or disgraceful conduct for removing merchandise from a store without paying" for it. Despite the gravity of this offense and its evident adverse effect on his ability to perform his duties, the Board considered, as it should in this case, his lengthy federal service and the fact that only one specification of misconduct was sustained in determining that demotion to a nonsupervisory position was the maximum reasonable penalty. In all of these cases, I believe the sustained misconduct was not only inherently more serious but also had a much greater demonstrable effect on the efficiency of the service than did appellant's activities in this case, yet the Board consistently found removal to be excessively harsh.

I also note that in cases of serious performance deficiencies, on the part of veteran supervisory employees, which directly and adversely affect their ability to fulfill the duties of their positions of trust and significant responsibility, the Board has consistently held that demotion to a supervisory position, at the same or lower grade, is the maximum reasonable penalty permissible under Douglas. See Rassmussen v. United States Postal Service, 7 MSPB 149 (1981); Hatler v. Department of the Air Force, 6 MSPB 605 (1981); Brewster v. Department of the Navy, 6 MSPB 547 (1981).

Accordingly, in consideration of the numerous mitigating circumstances surrounding this case, the context of appellant's alleged offense, and the questionable effect it may have had on the efficiency of the service, I would not sustain the removal.

CONCLUSION

The record before us affirmatively demonstrates that the "misconduct" of appellant constituted protected speech under the First Amendment. In any event to remove appellant based on the "misconduct" did not promote the efficiency of the service and hence was plainly beyond the bounds of reasonableness.

Therefore, I vigorously dissent.13/

May 19, 1983
(Date)

Dennis M. Devaney
Dennis M. Devaney
Member

Washington, D. C.

13/ When a question of policy is "before the house," free men choose to meet it not with their eyes shut, but with their eyes open. To be afraid of ideas, any idea, is to be unfit for self-government. A. Mieklejohn, Free Speech and Its Relation to Self-Government, 47 (1948).